

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED

2011 FEB 15 AM 9:00

CLERK US DISTRICT COURT
WESTERN DISTRICT OF TEXAS

BY
DEPUTY

ANDREW AMSEL, §
PLAINTIFF, §
§
V. §
§
THE TEXAS WATER DEVELOPMENT §
BOARD, and J. KEVIN WARD, in his §
official capacity, §
§
DEFENDANTS. §

CAUSE NO. A-09-CA-389-LY

ORDER ON REPORT AND RECOMMENDATION

Before the Court are Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction Pursuant to Federal Rule 12(b)(1), or in the Alternative, Motion for Judgment on the Pleadings Pursuant to Federal Rule 12(c), filed September 30, 2010 (Doc. #48); Defendants' Motion for Summary Judgment and Brief in Support, filed September 30, 2010 (Doc. #50); Appendix in Support of Defendants' Motion for Summary Judgment filed October 6, 2010 (Doc. #55); Plaintiff's Response in Opposition to Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction Pursuant to Federal Rule 12(b)(1), or in the Alternative, Motion for Judgment on the Pleadings Pursuant to Federal Rule 12(c), filed October 12, 2010 (Doc. #56); Plaintiff's Response to Defendants' Motion for Summary Judgment, filed October 12, 2010 (Doc. #57); Defendants' Reply in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction Pursuant to Rule 12(b)(1), or in the Alternative, Motion for Judgment on the Pleadings, filed October 25, 2010 (Doc. #64); and Defendants' Reply in Support of Motion for Summary Judgment, filed October 25, 2010 (Doc. #65).

The motions were referred to Magistrate Judge Robert Pitman for a Report and Recommendation on the merits pursuant to 28 U.S.C. § 636(b), Rule 72 of the Federal Rules of Civil Procedure, and

Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, as amended. The Magistrate Judge filed his Report and Recommendation on November 22, 2010 (Doc. #67). On December 6, 2010, Defendants filed their Objections to the Magistrate Judge's Report and Recommendation Dated November 22, 2010 (Doc. #68) and Plaintiff filed his Objections to the Magistrate Judge's Report and Recommendations Dated November 22, 2010 (Doc. #96). Plaintiff filed his Response in Opposition to Defendants' Objections to the Magistrate Judge's Report and Recommendations Dated November 22, 2010 on December 17, 2010 (Doc. #70). Defendants filed their Response to Plaintiff's Objections to the Magistrate Judge's Report and Recommendation Dated November 22, 2010 on December 20, 2010 (Doc. #71).

The Magistrate Judge recommended that this Court dismiss Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction Pursuant to Federal Rule 12(b)(1), or in the Alternative, Motion for Judgment on the Pleadings Pursuant to Federal Rule 12(c) (Doc. #48). The Magistrate Judge further recommended that this Court grant Defendants' Motion for Summary Judgment and Brief in Support (Doc. #50). In light of both parties' objections to the Report and Recommendation, the Court has undertaken a *de novo* review of the entire case file in this action and finds that the Magistrate Judge's Report and Recommendation is correct and should be approved and accepted by this Court for the reasons stated therein.

In his objections, Plaintiff asserts that the Court erred in granting summary judgment because Fifth Circuit precedent mandates that the jury, not the court, determines pretext and the veracity of a defendant's explanation for a termination decision once a plaintiff has satisfied a prima facie case of discrimination and has presented summary-judgment evidence supporting his claim of pretext. In response, Defendants argue that the Magistrate Judge applied the appropriate standard according

to Fifth Circuit precedent, that Plaintiff failed to establish a prima facie case, and that Plaintiff presented no competent evidence that the elimination of his position was made because of his disability, age, or the fact that he requested or exercised his right to FMLA leave. Defendants have met their burden of establishing that Plaintiff's job was terminated for budget reasons, and Plaintiff has failed to rebut that showing with evidence that Defendants' proffered explanation was only a pretext for discrimination. The Court finds that the Plaintiff's objections are without merit. Accordingly, the Court shall overrule Plaintiff's objections.

In their objections, Defendants assert that they fully support the granting of summary judgment, but object to (1) the Report's determination that they were not entitled to summary judgment on Plaintiff's ADA, Rehabilitation Act, and ADEA claims based on the affirmative defense of judicial estoppel and (2) the Report's finding that Plaintiff established he was "disabled" or was "regarded as disabled" for purposes of a prima facie case of disability discrimination. In response, Plaintiff argues that his claims are not barred by the doctrine of judicial estoppel because, as the Magistrate Judge recognized in his Report and Recommendation, the Texas statute governing state-employee disability benefits does not condition receipt of benefits on an inability to perform work with reasonable accommodation. Additionally, Plaintiff asserts that evidence established that Defendant Texas Water Development Board regarded Plaintiff as "disabled." The Court finds that Defendants' objections fail. Accordingly, the Court shall overrule Defendants' objections.

IT IS THEREFORE ORDERED that the United States Magistrate Judge's Report and Recommendation (Doc. #67) filed in this cause is hereby **APPROVED** and **ACCEPTED** by this Court.

IT IS FURTHER ORDERED that Defendants' Objections to the Magistrate Judge's Report and Recommendation Dated November 22, 2010 (Doc. #68) are **OVERRULED**.

IT IS FURTHER ORDERED that Plaintiff's Objections to the Magistrate Judge's Report and Recommendations Dated November 22, 2010 (Doc. #69) are **OVERRULED**.

IT IS FURTHER ORDERED that the Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction Pursuant to Federal Rule 12(b)(1), or in the Alternative, Motion for Judgment on the Pleadings Pursuant to the Federal Rule 12(c) (Doc. #48) is **DISMISSED**.

IT IS FINALLY ORDERED that the Defendants' Motion for Summary Judgment and Brief in Support (Doc. #50) is **GRANTED**. All Plaintiff's claims against Defendants The Texas Water Development Board and J. Kevin Ward, in his official capacity, are **DISMISSED WITH PREJUDICE**.

SIGNED this 14th day of February, 2010.



LEE YEAKEL
UNITED STATES DISTRICT JUDGE